Using Mediation to Resolve Human Rights Issues In the Workplace

prepared for
Alberta Human Rights and Citizenship Commission
by Dr. Gail H. Forsythe, Lawyer and Mediator

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An important note about human rights complaints:
Mediation can be a useful process to resolve human rights issues in the workplace. However, internal dispute resolution processes such as mediation do not take away an individual's right to make a human rights complaint to the Alberta Human Rights and Citizenship Commission. For information about the Alberta Human Rights and Citizenship Commission complaint process, contact the Commission. See page 49 for contact information.

Disclaimer:
This paper presents the concepts and ideas of the author, and not those of the Commission. It is presented for information purposes only, to provide readers with background information on alternative dispute resolution, with a focus on mediation. **It is not intended to be a guide to conducting mediation.** The Commission encourages employers and unions to engage the services of skilled and trained mediators if they choose to use mediation to resolve human rights issues.

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Using Mediation to Resolve Human Rights Issues in the Workplace[1]

Background

In 2001, the Alberta Human Rights and Citizenship Commission (the Commission) contracted with Howard Research and Instructional Systems Inc. to survey over 560 Alberta employers. The survey was undertaken to learn about employers' perspectives on human rights in the workplace and resources or programs that would support them in building inclusive workplaces that are free of discrimination. In March 2002, Howard Research published their findings in the report *Employers' Perspectives Research Project*. Among other things, employers expressed a need for information about a variety of topics related to human rights in the workplace. Over 80% of employers surveyed indicated that they placed a high or medium priority on information related to internal strategies for resolving human rights complaints in the workplace. This paper was developed in response to that need. The Commission contracted with Dr. Gail H. Forsythe,[2] a lawyer and mediator, to research and write the paper.

An important note about human rights complaints: While mediation can be a useful process to resolve human rights issues in the workplace, internal dispute resolution processes do not take away an individual's right to make a human rights complaint to the Commission. For information about the Commission's complaint process, please contact the Commission. See page 49 for contact information.

Introduction

Conflict and misunderstandings are facts of life. Employees, clients and customers interact with one another on a daily basis. In most instances, workplace communication is respectful and difficulties do not arise. The outcomes of effective interaction include increased business relationships, a more harmonious work environment and retention of valued employees.

In other instances, work-related conflict occurs due to misunderstandings, the presence of systemic barriers, or overt discriminatory attitudes and behaviors. The reactions of employees and customers who experience these situations can range from passive to

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1 © 2003 Her Majesty the Queen in Right of Alberta. **Disclaimer**: This paper presents the concepts and ideas of the author, and not those of the Commission. It is presented for information purposes only, to provide readers with background information on alternative dispute resolution, with a focus on mediation. **It is not intended to be a guide to conducting mediation.** The Commission encourages employers and unions to engage the services of skilled and trained mediators if they choose to use mediation to resolve human rights issues.

2 Dr. Gail H. Forsythe, B.Ed., LL.B., LL.M., S.J.D., lawyer and mediator. Dr. Forsythe was called to the Alberta bar in 1987 and the British Columbia bar in 1993. At the time of writing this paper, Dr. Forsythe was the Executive Director of the Cultural Diversity Institute, University of Calgary.

aggressive, the extremes of which are generally unhealthy, unproductive and, in extreme cases, violent. If such situations are ignored or unresolved, the outcome can be costly to everyone due to employee turnover, workplace disruption, emotional distress, and loss of goodwill.

Organizations can benefit significantly by taking steps to address the fact that most customers and employees would rather take their business and talent elsewhere than voice concerns about human rights issues. As a result of this avoidance behavior, management can be lulled into a false sense of security. Managers tend to assume that because complaints do not come forward, the workplace atmosphere is harmonious, respectful, and free of systemic barriers. However, when employees are surveyed anonymously, they tend to disclose a surprising number of unresolved conflicts relating to human rights matters.3 For example, when 40 employees of a large organization were surveyed, they disclosed their awareness of 16 unresolved concerns relating to human rights and personal harassment.4

Organizations need to create a climate where employees and customers feel optimistic that if they come forward, their concerns will be resolved quickly, fairly and safely. This paper is intended to assist employers, employees, and union representatives to understand how the mediation process works to preserve participant dignity while affecting organizational and attitudinal change.

One of the advantages of the mediation process is its capacity to generate maximum results with minimal risk to participants. Mediation is an ideal process for those organizations and employees who want to address workplace harassment and systemic discrimination issues without delay, without complexity, and without the financial cost to taxpayers associated with traditional human rights hearings.5

People who use mediation to resolve human rights concerns report high levels of satisfaction with the process. For example, 99.6% of complainants who settled their human rights case within 30 days reported that they would use the mediation process again.6 When properly managed, the mediation process provides a healthy alternative to the "just ignore it and it will go away" response that is so often heard by people who seek equitable and respectful treatment in the workplace. Mediation can also save valuable time, money and other resources by focusing people on problem solving rather than costly complaint escalation.

This paper begins with an overview of the importance of preventing conflict in organizations and the rationale for investing in employee education. It examines the role

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3 Based on the results of approximately 1,000 employee surveys distributed by the author in a wide variety of Canadian workplaces, with and without collective agreements, and across sectors over a nine-year period.

4 Survey conducted by the author during April, 2003 in a public sector workplace.

5 The estimated total potential cost to American taxpayers for government to handle one human rights case to and including the appeal stage is estimated as $200,609 USD, "The Cost Savings Associated with the Air Force Alternative Dispute Resolution Program," GSA Office of Equal Employment Opportunity, 2002 at 4

6 *Supra* at 7

and components of workplace policies that employers and employees rely upon to resolve their human rights complaints. This paper also provides:

- an introduction to a variety of dispute resolution process options, ranging from direct negotiation to formal proceedings, that are available to resolve human rights-related disputes that arise in organizations. These dispute resolution process options are placed along a "dispute resolution continuum" that illustrates the level of formality, outcome control and degree of adversarialism (or hostility) associated with each process

- a detailed description of the mediation and interest-based negotiation processes

- advantages and disadvantages of the mediation process

- when to use the mediation process, and who should participate

- an overview of confidentiality and power balance considerations that are critical to the effectiveness of the mediation process

- information about some of the limitations of the mediation process

The paper provides four examples of workplace discrimination cases that are resolved by using the mediation process:

1) sexual harassment between co-workers
2) racial harassment, personal harassment, and discrimination based on sexual orientation by a manager and directed toward an employee
3) failure to accommodate an employee's invisible disability
4) failure to accommodate an employee's religious needs due to an inflexible workplace policy

Although these cases are hypothetical, they are based on a compilation of actual workplace disputes. They illustrate participant needs, reactions and outcomes in a realistic manner.

The paper concludes by looking at some of the factors that an organization should take into consideration when selecting someone from inside or outside the organization to serve as a mediator.

It is beyond the scope of this paper to provide the reader with a detailed plan to manage the mediation process. Experienced mediators are trained in this regard; inexperienced mediators should not attempt to mediate sensitive workplace disputes unless they partner with an experienced mediator.

Nor is this paper intended to address the very practical question: "How does an organization or business pay for a mediator when resources are scarce?" Lack of funding

can be a barrier for some organizations, particularly small businesses, in their endeavors to respond more effectively to conflict. Budgeting for conflict prevention and mediation should be part of an organization's strategic planning and its prior zing of expenditures, in the same way that the organization budgets for other risks.

1. Preventing human rights complaints in the workplace: the value of investing in education and training

Causes of employee complaints

Employees generally have optimistic expectations when they enter the workforce. Regardless of levels of experience, employees want to be treated with respect and dignity. Employees also want to feel valued and productive while at work. Work is, for many people, an expression of identity and a measure of one's worth to society. Self-esteem is often linked to job satisfaction and career growth.

For many employees, this ideal is missing. Employees may perceive, either rightly or wrongly, that they are misunderstood, undervalued, and not treated in a respectful manner by their co-workers, supervisors or the public. In other instances, an employee may find that systemic barriers and overt harassment and discrimination are a day-to-day obstacle in the workplace. Either of these situations can trigger feelings of anxiety, resentment, or in some cases, depression. If this type of reaction occurs, employee productivity is likely to suffer. The employee, affected co-workers, and the employer may find themselves in a downward spiral that results in reduced morale, ineffective job performance, and increased conflict in the workplace.

If employees are unable to achieve their personal work-related aspirations, and be treated with equity and dignity, they may direct their feelings and needs inward, rather than outward. Employees in this situation may look for employment in a different setting, to escape an unhealthy or inequitable workplace. When an employee leaves an organization, the employer is normally faced with new costs to hire and train replacement employees. The employer may also find that valuable intellectual property and client information leaves with the employee. The employee may be faced with career interruptions or setbacks. These changes are a direct result of an employee's need to function in a workplace culture of respect, acceptance and equitable advancement. The unhealthy or inequitable workplace produces an outcome that is costly to both the employer and the employee.

Causes of this "revolving door" scenario include: a) the demonstration of inappropriate social behaviors by some employers, employees, or both, due to a lack of awareness about acceptable societal norms; b) negative assumptions and stereotypical attitudes toward people who are different from the dominant group in the workplace due to physical characteristic, culture, or religion; c) ineffective communication skills; d) a lack of anger management and conflict resolution skills; e) a desire to bully, intimidate or take advantage of others in the workplace for personal gain (each of which is an abuse of

power); and f) lack of awareness concerning legal obligations created by human rights law and other statutes such as the *Canadian Charter of Rights and Freedoms*.

Examples of discriminatory conduct that are not acceptable under human rights law include: failing to hire a person with a disability because of a presumption that a person with a disability cannot perform the job, and restricting an employee's opportunity to interact with the public or clients because of a personal attribute such as gender, pregnancy, sexual orientation, or color. Assumptions can arise due to a failure to critically examine whether an attribute is genuinely necessary for the employee to perform the job, in other words, whether this attribute is a *bona fide* occupational requirement.

Education increases employer competitiveness in the war for talent

In today's market, talented employees are highly valuable to the success of a business. Alberta employers need every competitive advantage possible to attract and, more importantly, to retain skilled employees who will enhance the employer's competitiveness and profitability. Leaders recognize that they can gain a competitive edge by being regarded as an employer of choice. Fostering a diverse, healthy and respectful work environment for every employee and customer, so that no person is overlooked or marginalized, is a goal that makes good business sense. A work environment that is respectful of individuals and human rights also makes good legal sense because the organization can focus on productive activities, rather than resolving human rights complaints.

One way to achieve a respectful environment is to provide employees with the tools and skills necessary so that they communicate, problem solve, and interact with maximum understanding and respect for one another. Investing in employee education and awareness building is a practical strategy that can produce long-term gains in the form of increased retention, less conflict in the workplace, and more effective interaction between employees and between employees and customers.

Education and conflict prevention: All businesses, small to large, can benefit from investing in developing employee skills

Here are some educational areas that are instrumental in building an effective, respectful, and productive workplace:

Communication skills – encourage employees to use open-ended questions and reframing techniques to check for clarity, demonstrate understanding, and build awareness about different cultural and gender-based communication styles.

Conflict resolution skills – provide employees with the tools to seek consensus and understand the value of collaborative and effective problem solving. Provide training to develop interest-based negotiation skills so that employees can build relationships from a position of principle, rather than a position of power.

Team building skills – enhance the ability of employees to understand that working together, rather than alone, can maximize creative output. Team building skills assist employees to acknowledge different points of view, rather than adhere to one way of thinking. This type of atmosphere can empower people to contribute rather than withhold ideas and demonstrate their capabilities. By developing awareness about different cultural and personal values, employee teams can develop greater synergy.

Leadership skills – encourage independent and creative thinking and reasonable risk taking, in a business context that values ethical approaches and long-term business goals rather than short-term solutions. Leadership training can instill a sense of pride and commitment at all levels within the organization. Create a workplace culture where all employees are pro-active. A sense of leadership can motivate employees to promptly address inappropriate or discriminatory behaviors so that a pro-active culture of respect becomes the workplace norm, rather than the exception.

In addition to education, employers and employees can benefit from adopting effective conflict resolution systems to support employees and the people they serve to resolve concerns promptly and with minimum cost. An effective strategy for large, medium and small workplaces is the adoption of policies. Policies can help employers articulate what employees and customers can expect from the employer and their colleagues in the workplace. In addition to providing procedural guidance and information when concerns arise, policies demonstrate the employer's commitment and approach to workplace diversity, including: a) hiring people who reflect the diverse population in the community; b) providing parental and medical leave; and c) responding, in a fair and equitable manner, to allegations of harassment and discrimination.

An effective strategy for a unionized workplace includes ensuring that collective agreements are inclusive and consistent with workplace policies. Collective agreements should address all potential grounds of discriminatory behavior, rather than only sexual or racial harassment (as is common in many collective agreements). Management representatives and union representatives can collaborate and preserve resources by taking steps to maximize the smooth resolution of complaints by ensuring that collective agreements and internal policies are consistent. Consistency is important from both a procedural point of view and from a content point of view. For example, a workplace policy and a collective agreement may each stipulate that an employee should not be harassed; however, the grounds on which a complaint may be based may differ in each document. Both the union and the employer have a responsibility to ensure that barriers based on systemic practices (excluding seniority exceptions) are not written into the collective agreement.

The cost of doing nothing

Employers who do not provide employees with the skills and education needed to interact in a culturally respectful and effective manner run the risks outlined earlier in this paper. Those risks can include defending a formal civil lawsuit, a human rights complaint, or

both, that is filed against the organization and, possibly, some employees. In some instances, such as sexual harassment, senior employees may face criminal charges, be named as defendants in a civil case, or both. If a formal complaint is filed with a tribunal or court, the personal consequences and impact on business reputation and productivity can consume everyone in the organization and be overwhelming.

The direct and indirect costs of responding to a human rights complaint include:

Employee down time
Employees may be key witnesses in a formal complaint. Their time may be required to prepare and participate in the tribunal process. The role of a witness can also be stressful and cause an employee to be distracted from work-related activities. Employee relationships can also suffer if a witness is perceived by other employees as having a particular loyalty to either of the parties to the complaint.

Managerial down time
Managers may also be called as witnesses. With respect to managers, the same considerations arise regarding stress and productivity disruption. In addition, managers may be involved in time-consuming meetings to negotiate a resolution of the complaint or to respond to the complaint.

Loss of goodwill
Employees, customers and the general public may perceive organizations and individuals named in complaints in a negative light. If a complaint receives media attention, an organization's reputation in the market place can quickly be eroded.

Loss of productivity or property
When employees leave an organization on good terms, there is often a gap or temporary loss in productivity until a new employee joins the team. In the case of a human rights complaint, the risk of loss may be increased if the employee harbors a high level of resentment toward the organization.

2. Workplace policies: articulating how your organization will prevent and respond to complaints of discrimination and harassment

Employers and employees can mutually benefit from a written policy that sets out the organization's goals, values, definitions, examples of behaviors, and procedural responses to related concerns about workplace harassment and discrimination. Customers also appreciate knowing that an organization with which they are doing business values a respectful workplace. For example, some federal government departments require external contractors to provide proof of such policies before awarding major contracts.

Employers who implement a clear written policy are in a better position to demonstrate that they take human rights in the workplace issues seriously. It is highly advantageous for employers to establish in advance and before problematic conduct occurs, process and

behavioral expectations for everyone in the workplace. A well-written policy can reassure employees that management will respond to behavioral concerns and allegations of harassment and discrimination in a fair manner. A policy can serve as an educational tool, help to clarify expectations, and build trust in management so that employees will make their concerns known, rather than remaining silent or looking for work elsewhere.

A written anti-harassment and complaint resolution policy:

- creates an objective and fair blueprint for a step-by-step complaint resolution process before the need arises
- gives people a road map or guide to follow when inappropriate behaviors occur in the workplace or when policies create systemic barriers
- allows people to make informed decisions about the process in which they will be involved, before coming forward with a complaint
- sends a message to employees that complaints are taken seriously and will be handled fairly
- reinforces the view that being respectful of others is a core value
- establishes flexible informal and formal dispute resolution process options

3. Model policy: description of typical conflict resolution steps

The most effective anti-harassment and anti-discrimination complaint resolution policies offer a combination of informal dispute resolution options, such as mediation, and more formal dispute resolution options, such as investigation. These process options may also include a choice of whether the person who will resolve the complaint will be someone internal to the organization, or external to the organization. This individual may be referred to as "the neutral" because of the unbiased attitude that the individual is expected to bring to the dispute resolution process in order to objectively and fairly resolve the complaint.

Anti-harassment and anti-discrimination complaint resolution policies typically include a series of mandatory "steps" or "stages" that the parties are expected to follow in order to resolve a work-related dispute. These steps or stages are often designed to encourage resolution in the least formal and least adversarial manner. If resolution is not achieved, the steps or stages that must be used by the parties tend to increase in formality and adversarialism. This type of system can be referred to as a "lock step" dispute resolution system.

A visual overview of a sample lock step system in a non-unionized workplace is outlined below:

- Direct Discussion or Direct Negotiation
- Facilitated Discussion or Training
- Mediation
- Investigation (internal or external)
- Formal Complaint

Direct discussion

A workplace policy may state that employees who are concerned about inappropriate workplace conduct may engage in a direct discussion with the employee(s) who are allegedly demonstrating inappropriate, harassing or discriminatory conduct. The policy must state that this step is voluntary, and NOT mandatory. The policy language must make it clear to the complainant that engaging in a direct discussion is not a prerequisite to other forms of intervention or action. In many policies, it is contemplated that this type of direct discussion does not involve employer intervention.

Employers should be cautious if they include the "direct discussion" step in their policy. An employee may interpret the policy to mean that a direct discussion is mandatory. The policy must make it clear that it is acceptable for the employee to come directly to management for assistance, rather than interact further with the individual who allegedly engaged in the offensive behavior. It is also important to support the employee by providing a resource person who can act as a coach or advisor to prepare the employee to participate in the direct discussion process.

Addressing the workplace environment through training

An alternative to direct discussion is for a concerned employee to approach a person in a position of authority and seek that person's assistance to address overall workplace behavioral concerns. The person in a position of authority may offer to facilitate a group discussion of an educational nature. This response may be appropriate if the person who identified the need and the person engaging in the allegedly inappropriate, harassing, or discriminatory conduct are not likely to be identified and singled out. The group could focus on an awareness-building activity: identifying desirable workplace behaviors.

Mediation

In many policies, mediation is included as one of the most informal, least adversarial and most flexible dispute resolution process options. Cases normally proceed to mediation on the basis of the employee's oral concerns rather than a written complaint.

Investigation

If mediation proves to be unsuccessful or inappropriate, the concerned employee or a person in a position of authority may request a formal investigation. There may be situations when there is a legal duty upon the person in a position of authority to recommend or select a dispute resolution process that differs from the process desired by the employee. For example, there may be an obligation to inform the police of a sexual assault or to initiate an external investigation. These cases will require a written complaint from either the employee or the person in a position of authority. If these process options are identified in the organization's dispute resolution policy, then employees and managers will have advance notice that they may be acted upon.

Grievance and arbitration

If an employee is part of a certified bargaining unit, and the collective agreement includes the type of allegations brought forward as a ground for a grievance, it may be appropriate for the employee to approach a union representative and file a formal grievance. If the grievance is not resolved, that outcome may lead to arbitration.

Written policy

A written policy should also inform employees that in addition to the applicable informal and formal options provided by the employer, the employee has the legal right to:

- make a complaint with the Alberta Human Rights and Citizenship Commission
- contact the police if an assault or a sexual assault occurred
- seek legal advice
- file a complaint with a professional regulatory body

4. Effective complaint resolution: alternative dispute resolution (ADR) or traditional process options

Traditional court and tribunal processes are essential to interpret, articulate, and establish social and workplace norms associated with human rights and equality legislation. Courts and tribunals are critical to serve the interests of justice and build awareness about the legal duty to adhere to human rights norms. These processes are often highly adversarial

and highly contested. The adversarial process focus is usually restricted to assessing past behavior, and functions in a context of assessing and assigning "blame" or responsibility for unlawful conduct.
Less traditional processes, collectively known as alternative dispute resolution processes (commonly called ADR), are essential to provide less adversarial and less costly problem-solving options. Literature indicates that arbitrated cases (those that fall under a collective agreement in a unionized workplace) were resolved more quickly than litigated cases; and an arbitrated case cost 30% less to resolve than a typical court case.7
Alternative dispute resolution processes are often more effective than traditional court processes in protecting intangibles such as trust, respect, and goodwill. 8

ADR processes offer different degrees of process control and outcome control to the participants, ranging from a high level of outcome control (for example with direct negotiation arbitration) to a minimal level of outcome control (for example with arbitration).

One of the most increasingly popular ADR processes to resolve concerns about inappropriate behavior in the workplace is mediation. Mediation is a process that serves the interests of the parties by creating opportunities for them to resolve their concerns in a more collaborative manner. Mediation focuses the parties on assessing the impact of past behavior, but in a context that focuses on the future. The mediation process usually permits the parties to look outside the boundaries of their conflict to find solutions that provide mutual gain and understanding, rather than "blame."

Characteristics of ADR processes

In general, ADR processes share the following characteristics and are:

Informal: Participants can decide the degree of formality that is appropriate for them to resolve their dispute. The less formality that is required, the more process and outcome control remains in the hands of the participants.

Flexible: Process management rules are established and agreed upon by the participants and, in some cases, adapted or modified as the process unfolds and as the needs of the parties arise. An ADR process is usually perceived as less demanding than a traditional court or tribunal process that requires the participants to adhere to rigid rules and time lines.

Non-threatening: In many instances, ADR processes are non-binding by agreement between the parties. In other words, the participants may accept or reject the recommendations or solutions that arise from the process. In some instances, the participants decide in advance that they will accept the recommendation or decision of a neutral third party. This decision results in a binding ADR process. Although a process

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7 The Cost Savings Associated with the Air Force Alternative Dispute Resolution Program, GSA Office of Equal Opportunity, as published in an email distributed by MIT on December 23, 2002.
8 *Supra*, GSA Office of Equal Employment Opportunity

may be binding, the decision to adhere to it is self-imposed and, therefore, participation is typically viewed as non-threatening.

Private: ADR processes usually offer privacy to the participants because they occur in a private, rather than a public, setting. Participants normally agree that they will involve only those individuals who are needed to assist with resolution of the issues.

Confidential: ADR participants often share a common expectation and desire that the information exchanged or disclosed during an ADR process is not used outside the process or before a tribunal or court. Confidentiality expectations are subject to governing law.

Economical: Generally, ADR processes are more economical than the traditional litigation process. However, cases are becoming more complex in nature. If arbitration is the ADR process selected, the level of preparation and expense may be comparable to that incurred when appearing before a human rights tribunal.

ADR processes rely upon the services of a neutral person(s) to play a process management role. In some ADR processes, such as arbitration, the neutral person(s) also plays a decision-making role. A skilled and experienced neutral:

- balance powers between the participants
- remains at arm's length from the participants
- is objective to ensure fairness of outcome to all participants
- manages the ADR process to ensure fairness of process to all participants
- serves a specific function that is agreed upon and understood by the participants
- preserves the credibility of the process

Description of process choices along the dispute resolution continuum

There are many types of dispute resolution process options. Some of the most common processes that are used to resolve workplace complaints are illustrated along the continuum below.9 The bar charts illustrate the approximate degree of process and outcome control offered by each dispute resolution process. The continuum is intended to demonstrate that process control and outcome control decrease as process formality increases. It is worth noting that adversarialism between the parties also tends to increase as process formality increases.

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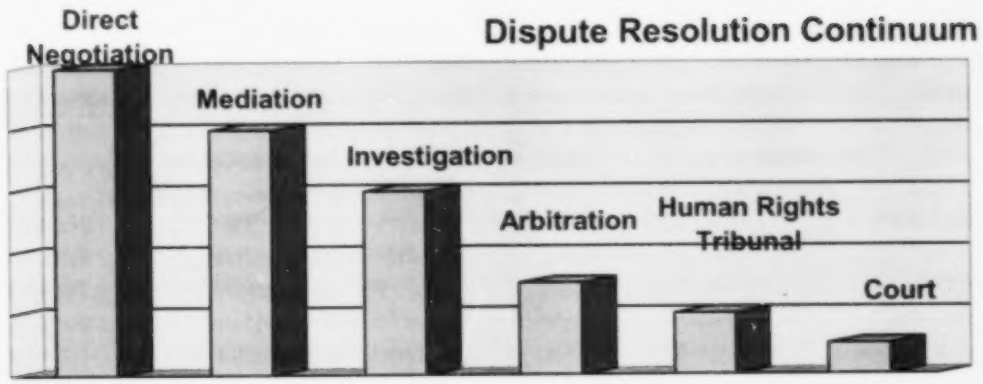
9 Adapted from *Handbook of Alternative Dispute Resolution*, (2d) Editor: Amy L. Greenspan, The State Bar of Texas Standing Committee on Dispute Resolution, (1990) at 15



Employees and employers may not think of direct discussion (or negotiation) between people in conflict as a dispute resolution process, however, misunderstandings and disagreements are often resolved face to face by direct negotiation and without the assistance of other people. Direct negotiation is a dispute resolution process option and a valuable alternative to formal court proceedings. Direct negotiation offers participants maximum control over the content of their discussions, and the decisions or outcomes that arise from those discussions. Although economical, this process option has the potential to put participants at risk because of power imbalances and physical or emotional safety issues.

When compared with direct negotiation, the arbitration process is near the opposite end of the dispute resolution continuum. The arbitration process offers very little outcome control to the participants because a neutral is usually authorized by the participants to make a decision that is "binding" upon them. Arbitration also offers very little process control because once arbitration rules are agreed upon, they normally remain in place for the duration of the process.

A detailed description of the most common dispute resolution process options, illustrated by the above continuum, follows:

Direct negotiation

- Definition: a process whereby two or more participants speak indirectly or directly with one another to resolve their concerns and achieve resolution.
- Role of the neutral: (none)
- Effectiveness: only when employees are comfortable attempting to understand one another and resolve their concerns without assistance from others. Requires effective communication and listening skills, a willingness to learn from one another, and a perception that the parties are relatively equal in their negotiating power. Rarely

successful in human rights cases because power imbalances typically exist and can be very subtle. Employees involved in harassment or discrimination may perceive that they have attempted to engage in a direct discussion with someone who has more power or authority in the workplace. This step is often taken without success, because the person with less power may use indirect communication techniques rather than direct communication to protect their job security or personal security.

Examples of indirect communication include: remaining silent when an inappropriate sexual or racial comment or joke is articulated; not laughing at an inappropriate joke; physically stepping away from a sexual harasser; or sharing information with another employee with the hope that the concern expressed will find its way back to management or the offending employee.

Requiring or "suggesting" that employees who are experiencing inappropriate, harassing, or discriminatory conduct in the workplace engage in direct discussion (which is actually a negotiation of the dynamics of the relationship) with the person demonstrating these behaviors tends to revictimize individuals and is likely to be ineffective due to power imbalances.

- Typical use: Direct discussion is more appropriate as a preventive measure to build awareness about appropriate and respectful workplace behaviors. With proper attention to power imbalances, this process option can be used to resolve complaints before they escalate.

- Risk: potentially highly adversarial or a further abuse of power.

Mediation

- Definition: an informal, non-adversarial and confidential (to the extent permitted by the courts or legislation) process whereby a neutral assists participants to voluntarily negotiate an interest-based solution that will address their concerns and the needs of all affected stakeholders.

  The mediation process may be "transformative" and result in improved relationships if the participants carefully examine their values and ways of thinking. During a transformative mediation, participants may accept a new perspective or point of view as part of their solution-finding process. This transformative aspect may result in long-term attitudinal change for the participants. For example, in a transformative mediation a person will learn why a behavior is problemati· 'emonstrate empathy for the individual, and then modify future behavior.

  The mediation process may be "non-transformative" if the parties limit their focus to resolving the immediate problem or concern rather than building increased understanding. In a non-transformative mediation, the focus is more on the solution rather than on fostering a long-term shift in attitude or thinking. For example, for the sake of expediency an individual may apologize for inappropriate behavior but not appreciate why the behavior is problematic.

- Role of the neutral: to adhere to the principles of effective mediation process management to balance power and create an emotionally and physically safe environment for frank, candid and honest discussion between the people involved so that they achieve a mutually acceptable outcome that can, if necessary, be enforced by the courts. The mediator's role may also include assisting the parties to agree upon mediation process rules; acting as a shuttle diplomat (a person who reframes and conveys messages between parties to build agreement); and acting as an agent of reality.

  An agent of reality is someone who asks questions that test participant perceptions. An agent of reality will also ask questions that require the participants to consider whether their proposed agreements are likely to have long-term acceptability. The mediator may also assist the participants to draft a settlement agreement for review by their advisors or lawyers. In some cases, participants may give the mediator authority to recommend or impose a solution if they cannot agree on a settlement terms. In that instance, the dispute resolution process becomes a hybrid mediation and arbitration process.

  It should be noted that, in mediation, the role of the neutral is usually more involved than in conciliation. Interested individuals should contact the Alberta Human Rights and Citizenship Commission directly for information about the Commission's conciliation process.

- Effectiveness: Mediation can be extremely effective when the people concerned participate voluntarily, and they want privacy, confidentiality, and an environment that allows them to resolve concerns without casting formal blame. Mediation works best in workplaces where management is actively involved in assisting the parties to explore and implement workable solutions. By endorsing mediation, adopting policies that include mediation, providing resources, and educating employees about the mediation process and confidentiality protections, management can foster a workplace culture where people feel comfortable voicing their concerns at the earliest stage possible. This type of atmosphere can contribute to the overall well-being and productivity of the workplace by encouraging new ideas, creative problem solving and open-minded attitudes.

  Mediation is also an effective alternative when behavioral change is desired, and formal processes, such as a human rights complaint or investigation, are unrealistic or likely to cause more harm. Mediation results are usually achieved far more quickly and economically than by investigation or arbitration. Outcome control is generally very high because participants can agree or disagree with proposed solutions. They may opt to terminate the process at any time.

- Typical use: when an employee wants to raise awareness on the part of the offending individual or management with minimal stress, continue to interact effectively with co-workers, and remain in the workplace. Also suitable when awareness is needed to change or stop offending behaviors that may be inappropriate, but do not necessarily meet the strict legal definition of harassment or discrimination.

- Risk: not suitable when the mediator lacks the needed experience, training or skill to effectively balance power and manage the process so as to avoid causing additional harm to any participant. Due to legal constraints, confidentiality may not be as extensive as desired by the participants. For example, although the parties may agree not to disclose information outside the mediation process, a court or tribunal may determine that, in order to ensure fairness in a subsequent or related legal proceeding, a participant to the mediation process must testify about discussions that occurred in mediation or produce records that were shared in mediation.10

Investigation

- Definition: a process of inquiry whereby a neutral person called an investigator is appointed by management to interview the parties to the complaint. The parties are referred to as the complainant and the respondent. The investigator will also interview witnesses regarding the interaction or behavior of the parties.

- Role of the investigator: to manage and conduct the investigation process in accordance with the principles of natural justice11 and to report facts, evidence, law and conclusions to management. The investigator must decide and report if the complaint is meritorious, lacks merit, or is frivolous and vexatious. In general, a frivolous complaint is one that is brought forward without any sincere belief in its merit. A vexatious complaint has no legal basis and is intended to cause serious harm to the other person.

  In some cases, the investigator's role is to make recommendations. The investigator may be someone from inside the organization (internal) or from outside the organization (external). The investigator normally interviews individually and in private, possibly with an advisor present. The advisor's role is to observe the process rather than act as a spokesperson for the individual.

- Effectiveness: The investigation process can be very effective when management requires an objective determination or conclusion whether harassment or discriminatory behavior has occurred in order to justify disciplinary or remedial action. It can also be invaluable to determine if a complaint is frivolous and vexatious. The process is only as effective as the knowledge, training and ability of the investigator to apply human rights law and adhere to the principles of natural justice to ensure fairness to all parties.

- Typical use: when a complainant needs a conclusive finding of law to establish a precedent or "vindicate" their perspective concerning the behavior in question; when

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10 Mediation confidentiality is a complex and evolving area of law. For more information, see Forsythe, G. H. *A Comparative Analysis of Canadian and American Law Relating to the Preservation of the Confidentiality of Settlement and Mediation Discussions*, 2001, ProQuest Company.

11 The principles of natural justice are defined by a body of law that is continually evolving. In general, the concepts associated with "natural justice" relate to notions of fairness, disclosure, and a complete opportunity to defend oneself.

an employer needs reasonable justification to discipline or terminate an employee; or when management needs to resolve a particular issue or complaint.

- Risk: With adequate introduction and explanation of the process by management, employees are less likely to feel the need to demonstrate their loyalty or support for either party. The private nature of the witness interviews and the final report can also cause employees to question the process or management's willingness to implement solutions. It is important that both parties are informed of the investigator's conclusions so that they can obtain closure.

Arbitration

- Definition: an adversarial process whereby an arbitrator or a panel of arbitrators appointed by the parties, listens to the evidence presented by the parties (or their representatives or legal advocates), and their witnesses, to determine if a work-related grievance has merit or should be dismissed. It is usually agreed in advance if the process outcome must be adhered to by the parties; in which case, the arbitration award is considered binding. Depending on the circumstances, the arbitrator's decision may or may not be appealed to the courts. Although uncommon, it is possible for parties to agree in advance to use the process but not be bound by the arbitrator's decision; in other words, the decision is for their information only.

- Role of the arbitrator: to conduct the process, hear the evidence, ensure that the parties adhere to procedural and evidentiary rules, and render an oral or written decision known as an award. The neutral must ensure that the principles of natural justice are followed so that the process is fair to the parties.

- Effectiveness: This process is effective when the grounds for the allegations fall within the language set out in the collective agreement. If there is a dispute whether or not the collective agreement language includes the ground alleged, further contentious issues may arise. It is also effective when required by a collective agreement and when a determination or award is desired to build awareness for all people in the workplace. The presence of advisors or legal advocates during the process can serve as a check to raise any concerns about procedural fairness. A right of appeal may or may not exist.

- Typical use: normally only pursuant to a collective agreement that includes general or specific grounds of discrimination or harassment as a basis to proceed with a workplace grievance.

- Risk: Due to the increasing complexity of evidentiary rules and case law, the arbitration process can be as complex and time consuming as a human rights hearing. Its adversarial nature can divide employees. Arbitration generally requires careful adherence to procedural rules. The increased formality of the process, the presence of representatives or lawyers, and the opportunity for cross-examination of witnesses,

may cause heightened feelings of distress and anxiety for parties and witnesses.

Human rights tribunal

- Definition: a process whereby a panel is given jurisdiction under the *Alberta Human Rights, Citizenship & Multiculturalism Act* to hear human rights complaints and determine whether the complaint has merit. The panel has authority to make an order as prescribed under section 32 (1) (b) of the *Act*.

- Role of the neutral: to conduct the hearing and manage the process in accordance with the procedural rules and regulations established under the *Act* by the Alberta Human Rights and Citizenship Commission and the principles of natural justice; apply the statutory law and case law; and issue a written decision.

- Effectiveness: very effective when public attention or media exposure is desired to heighten public awareness. This process can also be effective to publicly vindicate the successful party. For example, if a party to a formal complaint is criticized by co-workers, a third party, or the media, for their position in either bringing forward or defending a complaint, the tribunal's decision is an important source of validation. The filing of a formal complaint can be extremely divisive for a workplace and its employees. People may be quick to leap to judgment rather than remain neutral pending the outcome of the case. A complaint can also negatively impact morale and productivity, and cause workplace productivity disruptions and a loss of public goodwill regardless of outcome. The process is intended to be user-friendly, but rules of procedure and increasingly complex cases can make the process time-consuming, costly and overwhelming for participants. Legal expertise is often required. There is no outcome control for the participants and outcomes are typically win or lose.

- Typical use: to obtain damages for loss of dignity and economic loss due to discrimination; to identify systemic barriers; to implement policy reform or training programs; to establish precedents to foster social awareness and change; and to focus media attention.

- Risk: A human rights hearing may be open to the public or the media. Decisions are a matter of public record. Decisions are subject to appeal to the courts.

Civil court or criminal court

- Definition: an adversarial process conducted in a public forum whereby a judge, possibly in conjunction with a jury, is given exclusive legislative jurisdiction to hear evidence relating to a civil claim or a criminal charge and determine if, in the case of a civil claim, the claim has merit; or, in the case of a criminal charge, the accused is guilty.

- Role of the judge: to conduct the trial in accordance with the procedural rules of court established under relevant statutes, the rules of evidence, and the principles of natural

justice. The judge must apply the statutory law and case law, and issue a written decision. A judge may also hear an appeal from a decision issued by a human rights tribunal.

- Effectiveness: The jurisdiction of the civil and criminal courts is established by legislation. The court process is useful in situations such as when seeking a win/lose outcome and damages for a variety of claims such as, but not limited to, wrongful dismissal. The criminal court process can be useful in cases of alleged sexual assault to determine guilt, impose a criminal sanction, and protect the public.

- Typical use: in civil cases such as: defamation or intentional infliction of nervous shock due to emotional distress caused by sexual harassment, racial harassment, or sexual assault; employer negligence for failing to protect an employee from harassment or sexual assault; constructive dismissal in cases where an employee was forced to resign employment due to a poisonous work environment; or wrongful dismissal in cases where an employee was terminated without cause (even though harassment or defamation was alleged as justification for the termination).

- Risk: The civil and criminal courts involve complex rules of procedure. The court process is time-consuming because cases may not be resolved for several years. The court process is also costly because preparation time, workplace disruption, and legal expertise are generally required. There is no outcome control for the participants unless a settlement or, in the case of a criminal charge, a plea bargain is negotiated. The outcome of the process is also subject to appeal.

5. Key components of an effective mediation process to resolve workplace complaints

As outlined in the previous section of this paper, there is a range of dispute resolution processes that can be used to resolve concerns about allegedly harassing or discriminatory behavior in the workplace. In many instances, the person who brings forward a complaint is simply interested in ensuring that the inappropriate behavior will stop, and that others will not be subjected to similar behavior. In order to achieve this type of outcome, a dispute resolution process that allows opportunities for increased understanding and negotiation of solutions may be required.

Negotiation is a process whereby mutually acceptable outcomes are achieved as a result of the identification, exchange, rejection or acceptance of ideas or offers by the parties or their representatives. It can include any form of communication, direct or indirect, whereby parties who have some opposing interests discuss, without resort to arbitration or trial, the form of any joint action which they might take to manage and ultimately resolve the differences between them.12

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12 Law Society of Upper Canada Research and Planning Committee, *Short Glossary of Dispute Resolution Terms*, July 1992

Negotiation processes differ significantly and form a continuum with interest-based styles at one end of the continuum and power-based styles at the opposite end of the continuum. A power-based negotiation model typically involves struggles of will, assertions of strength, or manipulation of power to achieve one-sided gains. The focus of power-based negotiations revolves around the notion that "I win/you lose." A central concept to power-based negotiations is that there is a fixed or limited amount of assets or resources available for distribution.

Power-based negotiation is generally not appropriate for the workplace because, in this model, people tend to quickly become firmly entrenched in inflexible and adversarial positions. Harassment and discrimination cases typically involve an abuse of power. A power-based negotiation process is likely to reinforce that inequity and cause further damage to the person(s) subjected to the inappropriate or unlawful behavior.

Interest-based negotiation

The interest-based or principled negotiation model allows all participants to look for mutual gains whenever possible and, where interests conflict, to focus on a result that is based on a fair and objective standard.13 This type of negotiation creates an atmosphere that supports all participants in meeting some or all of their needs without leaving the other person feeling exploited. For this reason, interest-based negotiations are often described as win/win. The focus is on being creative to increase the number and type of options, assets, solutions and resources available to the parties.

An interest-based negotiation process that builds awareness about the negative impact of inappropriate behaviors, and that allows people to identify future-focused solutions, is often perceived favorably by complainants, respondents and employers involved in resolving workplace complaints. Experience indicates that few complainants want to be the catalyst for an internal investigation or a formal complaint. Many complainants prefer a process that allows them to make their concerns known without escalating the complaint into an adversarial contest.

Employers should bear this factor in mind and carefully consider, in consultation with the organization's lawyer, a range of dispute resolution process options that will allow the employer to meet its legal obligations to the complainant, the respondent, and other people, such as co-workers or customers, who may be affected by the alleged behaviors that form the basis for the complaint. A mediation process that is based upon an interest-based negotiation model can be less disruptive to the workplace than an investigation or a formal complaint. It can also provide an ideal forum for people to learn new and more socially appropriate behaviors while maintaining their dignity.

One of the characteristics of the interest-based negotiation process is that participants separate the people from the problem. For example: participants discuss why an unwanted behavior has a negative impact, rather than labeling the offending person a

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13 *Getting to Yes: Negotiating Agreement Without Giving In*, Fischer, Roger & Ury, William, 2nd ed., Penguin Books, 1991, at xviii

"racist" or a "harasser." From this discussion, the participants could discuss and agree upon desired behaviors and their positive impact on each other and co-workers.

The interest-based negotiation mediation process is effective and advantageous for people in the workplace because it:

- encourages communication and self-reflection rather than blaming
- allows people to identify and focus on their needs rather than their "positions" or demands
- shifts people from expressing their "power" to collaborating on creative solutions to address current and future needs of all stakeholders
- promotes awareness-building and understanding rather than negativity
- motivates creative and independent thinking rather than rigidity and traditional responses
- fosters an atmosphere where people attempt to generate many options and solutions
- encourages the use of objective criteria based on fact, rather than subjective ideas based on untested assumptions, to resolve problems
- motivates participants to identify their best alternative to a negotiated agreement (BATNA). The best alternative to a negotiated agreement can be referred to as the standard against which any negotiated agreement should be measured.14 An individual's BATNA can be identified by considering the options or choices that the individual may exercise, if a solution to the problem is not achieved through the negotiation process. When considering one's BATNA, it is often useful to ask the questions: "If I decline to accept the solution(s) proposed, what are my other options?" and "Will those other options meet my needs as effectively as the solution(s) proposed?"
- fosters preservation of working relationships rather than alienation and can result in improved workplace management strategies and other unexpected benefits that increase productivity and enhanced performance

The interest-based negotiation process may be seen as disadvantageous because it requires:

- adequate time and patience to better understand underlying needs and identify any hidden agenda

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14 *Supra*, at 100

- information-sharing
- creative, new ways of thinking and understanding others
- acknowledgement of (not necessarily agreement with) the other person's point of view
- trust that information shared will not be used against a person's interests
- preparation to identify one's BATNA

Effective communication skills

During mediation, the interest-based negotiation process requires the mediator to use active listening skills, various forms of questioning, and acknowledgement to encourage the participants to focus on their needs and interests (rather than their "positions") and effectively communicate with one another. Effective communication skills include:

Reframing: The mediator restates a participant's negative statement with a positive, future-focused purpose. For example when one participant says to another: *"You always disappoint me,"* the mediator can reframe this statement as: *"In order to come to an agreement, you need the other participant to demonstrate the capacity to follow through on commitments."* Reframing allows the participants to focus on the needs or interests that must be met, rather than on their negative perceptions about the other person.

Refocusing: The mediator interjects before a person makes a negative comment, and encourages the participant to restate the positive portion of a comment. For example when one participant says to another: *"I like it when you demonstrate these positive behaviors but you are mean spirited because you always...,"* the mediator can interject before the list of negatives is stated and use a probing question to encourage the participant to: *"tell me more about the positive behaviors."*

Clarifying: The mediator asks for more information from a participant by asking a question to obtain more detail and understanding. For example: *"Can you tell me what you mean when you say that you become uncomfortable when ..."?*

Using open-ended questioning: The mediator invites the participant to share more of the underlying information, meaning or values that are important to the speaker. For example: *"What is it about those positive behaviors that makes you feel respected?"*

Using consequential questioning: The mediator encourages the participants to think about their needs by asking them questions that require them to anticipate the long-term impact of their suggested solutions. For example: "If your goal is to encourage other supervisors to accept the idea that demonstrating positive behaviors is good for employee morale, how will your suggestion that this supervisor be fired support that outcome?" By asking consequential questions, the mediator can urge the participants to conduct a reality check.

These are a few examples of the many effective communication techniques that employees and supervisors can learn. Mediators frequently use these communication techniques to assist participants to resolve work-related harassment complaints. They can also be invaluable components of the day-to-day skill sets that can significantly enhance the ability of employees to interact with both other employees and the people who do business with your organization.

6. Mediation can meet employer, employee and union interests or needs

Employers, their employees, and their customers, have much to gain by preventing the escalation of workplace disharmony, conflict or formal complaints that can arise due to a lack of respect for the individual or understanding of the needs of a diverse workforce and customer base.

Experience indicates that mediation reduces the risks and costs associated with unresolved workplace disputes. Mediation can be briefly defined as: a voluntary process by which an impartial and neutral person facilitates communication between the participants to promote understanding, problem solving and, in many cases, the settlement of formal disputes. Mediation is an ancient process that can be effectively used in the modern workplace to satisfy employer and employee interests.

Mediation is a process that incorporates interest-based negotiation. Mediation encourages collaborative outcomes because the process fosters the sharing of information and generating of solutions in a non-blaming atmosphere. The "interest-based" negotiation process is an integral component of an effective mediation.

Mediation can be an appropriate dispute resolution option for employers and employees who are concerned about discrimination, harassment or inappropriate conduct in the workplace because the process provides:

- privacy so that all may participate without public humiliation or embarrassment
- confidentiality of the discussions to the extent permitted by law as well as a setting where an experienced person balances power and assists the people involved to find creative solutions
- an opportunity for participants to learn about the impact of inappropriate conduct. This objective is consistent with the intent of provincial and federal human rights legislation.
- an opportunity for recipients of inappropriate behavior, harassment and discrimination to be empowered

- a safe place for emotions to be expressed, concerns to be aired, and needs to be acknowledged without negative and stereotypical labels such as victim, trouble maker, racist or harasser

- a safe place for those who engage in inappropriate conduct to voluntarily agree to modify their behavior

- equal opportunities for participation without casting blame or concentrating on liability and punishment

- "win/win" or interest-based solutions that are future-focused, action-oriented and pro-active. Admissions of "guilt" become less important than finding solutions that are mutually agreeable to all participants.

- resolution within hours or days, instead of years

If the mediation process does not result in a partial or complete agreement, other dispute resolution options remain open to the participants.

The mediation process is also an ideal venue for participants to identify how they can work together or put into place policies, programs, or other support measures that will address typical employee and employer interests, such as:

- working productively and safely on both a physical and emotional level, in a respectful and inclusive environment

- demonstrating leadership by being respectful of co-workers and their diversity because the workplace culture supports this type of interaction

- demonstrating effective communication, conflict resolution, and anger management skills so that problems are resolved promptly

- developing and maintaining relationships with co-workers, supervisors, and customers

- meeting or exceeding performance objectives

- maintaining job security and equitable opportunities for advancement in the workplace

- participating in fair, non-adversarial and low-stress complaint resolution processes

For those organizations that have certified bargaining units, the mediation process can benefit the union and its members, because it is flexible, future-focused and non-adversarial. The mediation process provides added value for union representatives who need to:

- serve bargaining unit members equitably regardless of each member's role in the conflict
- maintain process outcome control for members
- provide timely resolution for members
- have input into solutions that affect the workplace and meet the needs of the bargaining unit as a whole
- preserve bargaining unit resources by avoiding costly, adversarial processes
- establish, when appropriate, future practices that are acceptable to the members
- build support within the membership by demonstrating union flexibility
- select only the most appropriate cases for formal adversarial and precedent-setting proceedings
- establish and maintain credibility and long-term relationships with members and management

Mediation is NOT an appropriate dispute resolution option when:

- a public precedent must be established in order to educate others or prevent further complaints of a similar nature
- there is a significant power imbalance and no willingness, resources or expertise is available to address that imbalance
- the mediator lacks skill, experience or impartiality
- there are no confidentiality protections
- the employer does not support the process
- the participants do not understand the role of the mediator or the limitations of the mediation process

- key stakeholders are not present or included in the discussions or negotiations

In order for the mediation process to work, participants should be prepared to demonstrate their sincerity by participating in the process in a candid and forthright manner. Participants should also try to temporarily suspend their judgment, and come to the process with an open mind, so that they are receptive to new ideas and solutions. It is also important that participants dedicate their full time and attention to the process so that they can participate completely and without unnecessary pressure or distraction.

With the foregoing in place, participants can reasonably expect the following outcomes from the mediation process:

- increased awareness about the employee's, the employer's and, in the case of a unionized workplace, the bargaining unit's concerns

- positive changes in the behavior or conduct of those employees involved in the process

- an opportunity to consider systemic issues and how workplace policies and procedures impact employees faced with similar concerns

Who should participate in mediation?

Workplace mediation will typically involve concerns related to inappropriate behavior, allegations of harassment or discrimination, and possibly performance issues. Each person who brings forward such a concern should play an active role as a participant in the mediation process. Managers, supervisors, or in some cases union representatives, who have interests at stake should also play an active role in the mediation process. Management interests may differ from those of the participants. If that is the case, the process can be described as a three-way mediation. The type of participation, and degree to which a person is involved, should remain a discretionary matter for the mediator and participants to determine. Participants may join or withdraw, as the mediation process unfolds.

It is not uncommon for others to assume, with good but misguided intentions, that a participant should or should not participate in the mediation process. For example, it may be assumed that it is inappropriate for a person who is the subject of sexual or racial harassment to participate in mediation. This assumption can undermine an individual's sense of self-esteem and freedom of choice. Participating in the mediation process may be the most empowering and desirable option available to individuals in this situation. Unless there are concerns about the person's intellectual capacity to make a safe choice, participants should self-select to participate in the mediation process.

The question "who should participate in mediation?" also raises the subject of voluntariness. Participation in mediation should be voluntary. A participant who participates in mediation must always remain entitled to:

- consult a professional advisor or lawyer before and during the mediation process
- consult a union representative if the employee is a member of a certified bargaining unit
- proceed with a formal human rights complaint within the statutory limitation period (being within one year after the alleged contravention of the *Human Rights, Citizenship & Multiculturalism Act)*
- make a formal professional conduct complaint to a professional discipline body
- contact the police if there are concerns about sexual assault or other criminal behaviors

If a participant is required to give up any of the foregoing rights in order to participate in mediation, the credibility of the process can be severely compromised. If procedural fairness or other concerns arise, the settlement agreement achieved may be overturned by the courts.

In some jurisdictions or workplaces, participation in mediation is described as mandatory. For example, in some provinces or states, people who have filed formal civil complaints with the court can be ordered by a judge to participate in mediation. Some employers require their employees, as a condition of employment, to participate in mediation to resolve work-related concerns. Even though participation in these programs is mandatory, the programs do not go so far as to require participants to agree to any settlement proposed during the process. Both mandatory and voluntary mediation programs recognize that participants should be entitled to accept or reject settlements proposals.15

Mandatory mediation programs are typically based on the same principle as voluntary programs: participants must participate in good faith. In other words, participants bring a sincere desire to settle to the negotiations. They are also candid with one another. This principle also applies with respect to the mediation of workplace complaints. Employees may be encouraged to participate in mediation; they must not be pressured to settle their differences out of fear of job loss or retaliation. Agreements achieved must reflect genuine and voluntary participation.

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15 Mandatory mediation should not be confused with binding mediation. Binding mediation usually involves two stages: 1) negotiation between the parties; and 2) if negotiations fail, the mediator imposes settlement terms. This process is sometimes described as med/arb because it combines the mediation process and the arbitration process.

Aside from the individuals directly affected by the concerns raised, other employees, advisors or, in the case of a small business, the owner have specific roles to play in the mediation process. These individuals may need to be included in the mediation process. Their role can be to:

- work with, understand and support all participants to help them achieve the outcomes that they identify as solutions
- alert the parties to solutions that may not be achievable
- ensure that management's duty to identify and resolve systemic or more serious issues is met

In some cases, the organization's lawyer will advise the human resource manager on the best course of action for the organization. This course of action may differ from the desires of one or more of the participants. In that case, the human resource manager's presence at the mediation table becomes even more important to ensure that the organization's interests are addressed. It is important for management to remember that the role of the organization's lawyer is to protect the organization's interests, and not to advise specific employees about their legal rights or options. If an employee requests legal or other professional advice, the organization may opt to provide the employee with support so that the employee can contact independent legal counsel or a professional advisor.

In some circumstances, and generally on the advice of the organization's lawyer, the organization may make a financial contribution to the costs incurred by an employee to obtain independent advice. Independent legal advice should always be encouraged, particularly before a participant commits to an agreement achieved in mediation.

A step-by-step overview of the mediation process

The mediation process is as variable as the mediators available to manage the process. In the context of a workplace dispute relating to allegations of harassment and discrimination, it is likely that a mediator will take the following concurrent steps:

- Conduct separate pre-mediation information-gathering meetings with each of the key stakeholders such as: the employer's representative, the person concerned about the behaviors, the person who allegedly engaged in the behaviors and the supervisor(s) of each of these individuals. The mediator's role at this stage is to help the participants understand the mediation process, gather information, identify issues, address power imbalances, and identify and resolve process concerns.
- Assist the participants to come to an understanding, preferably written, about the nature of the process, the rules or guidelines that people will follow during the process, and the level of confidentiality that can be anticipated.

After completing the foregoing, the mediator will assess, in consultation with the participants, whether it is emotionally and physically safe for the participants to meet directly or indirectly. The mediator may meet with all or several of the participants to conduct the next stage of the process. This stage of the mediation process provides the participants an opportunity to meet in the same room and interact more directly with one another. Breakout rooms may be provided to provide the participants with some privacy during the process as well as physical and emotional relief from the strain of interacting directly with one another.

If it is emotionally or physically unsafe for the participants to be in the same room, the mediator may prefer to act as a "go-between" or shuttle diplomat. The mediator may also suggest that the participants use technology such as video conferencing or speaker telephones to keep the parties physically safe. This interactive part of the mediation process is likely to involve the following principles and steps:

1. The mediator will begin the mediation process by making an opening statement. The purpose of the opening statement is to outline: mediator and participant roles, the purpose of the process, the advantages of resolving concerns through mediation, the risks of not resolving concerns with mediation, confidentiality protections, and reasonable process expectations. At this stage of the process, the mediator will likely invite the participants to agree upon ground rules and confidentiality commitments. The mediator will then proceed to identify the general nature of the issues and seek consensus on an agenda for the discussion.

2. The person who is concerned about behavior may be invited to outline their perceptions about the behaviors in question. The individual may also be invited to describe the impact of the behaviors or events. Some venting of emotions may occur at this stage.

3. The person who is responding to the issues will be invited to outline their perceptions concerning the behaviors or events. This individual may also have needs that need to be addressed and those may be identified at this stage. Some venting of emotions may also occur.

4. Other stakeholders, such as a manager, supervisor or union representative, may also participate and be invited to outline their perceptions, particularly about the systemic issues involved and the impact of the concerns on other employees and the organization.

5. Between each of the above steps, the mediator may reframe, clarify and seek further information from each participant. This process may occur in the presence of all participants or in the presence of one person only. As part of this step, the mediator will attempt to identify the individual and common goals and needs of the participants, plus any systemic or related issues that need to be addressed.

6. The mediator will work with all participants to assist them to jointly understand, explore and identify common needs, desired behaviors, and future-focused solutions. Or, the mediator may separate the participants and do this work in private. The mediator may also carry information back and forth between participants. This function is known as shuttle diplomacy.

The mediator will assist the participants to narrow their proposed solutions until consensus on some or all of the issues is achieved. The mediator will record the agreements achieved and ask the participants to commit to their proposed solutions. In some cases, the mediator will recommend that the participants seek external professional advice before making their commitments to one another. The participants may review the agreement achieved in principle with their advisors to seek further input and final approval.

If agreement is not achieved, the process may continue at a later time, or the mediator or one of the participants may terminate the process at any time, or the mediator may declare an impasse.

An important aspect of this process is post-mediation follow-up by the parties, their advisors and/or the mediator to determine if the agreement or solution achieved is working to everyone's satisfaction.

Realistic mediation outcomes

The successful mediation of workplace harassment and discrimination complaints can result in solutions such as:

- an oral or written apology
- a change in behavior (moving from offensive to acceptable)
- voluntary participation in educational and awareness-building activities
- voluntary changes to existing reporting relationships
- mutually acceptable language to describe certain past events to co-workers, external people or the media
- increased work-related opportunities or different working conditions
- management commitment to create new or revised policies that address systemic issues
- formal settlements of human rights complaints or civil actions that include: the payment of damages for loss of dignity, economic loss, and costs; confidentiality

terms relating to disclosure of settlement details; and the provision of letters of reference

- an outcome or agreement that can be acted upon without violating personal and employer values, ethics or law

Mediation participants should NOT expect:

- a formal admission of liability from any participant
- an immediate solution or radical change in attitudes exhibited by the other participants, the employer, or union representatives (Genuine change requires adequate time.)
- a complete solution, or a solution for every situation
- the mediator to provide the solutions
- the mediator to manipulate, order or direct the participants
- other participants to permanently waive their legal rights in order to participate in the process. An employee may voluntarily agree to temporarily defer or postpone the filing of a formal internal or external complaint, in order to give the mediation process time to work.

7. Confidentiality and balancing power in the mediation process

Confidentiality

The mediation process is generally regarded as highly confidential because the participants normally agree, both orally and in writing, to only share information between themselves, and not with people outside the process. In other words, they agree not to use information from the mediation process in another proceeding, such as an internal investigation, a human rights case or civil case.

It is important for the mediator and the participants to define what they mean by the term confidentiality. Affirming that each participant has the same understanding of that term is a critical procedural step, because different cultural contexts can result in different interpretations.

The term "confidential" (keeping discussions and information private) should not be confused with the term "anonymous" (keeping the identity of someone private). In the interest of procedural fairness, it is usually necessary to disclose the identity of a person who brings forward a complaint. Therefore, regardless whether mediation is contemplated or not, employers and supervisors must help employees understand this

distinction. They can do so by indicating to employees, that although their identity as a person concerned about work-related behavior is likely to be disclosed, details about the behaviors in question will only be shared on a "need-to-know" basis. This type of explanation should be included in the organization's workplace policy so that employees are not caught by surprise.

Confidentiality is an important element for the success of the mediation process. In order for the mediation process to be effective, participants generally require:

- process security: People will participate with a genuine desire to resolve their concerns rather than with a hidden agenda. A hidden agenda could include: using the mediation process to gather more information about the other individual; testing the other individual's resolve or belief in their point of view; or assessing the other individual's capacity to be an effective witness in a civil or tribunal proceeding.

- personal security: safety from emotional or physical harm directed by one participant toward another. Personal security concerns arise before, during and after the mediation process, for example, if a participant is likely to encounter a hostile participant in an elevator on the way to or from the mediation room.

- protection of their reputation and personal integrity

- protection from backlash, division of workplace loyalties, or retaliation. In other words, the employer demonstrates to all employees, by modeling appropriate behavior, that confidences shared during the mediation process are respected and not used to inflame negative attitudes toward any participant.

There are competing interests involved when addressing confidentiality needs. On the one hand, participants need a certain level of assurance that what they say in mediation will not be used by other participants to cause harm. On the other hand, there may be a legal duty to disclose information to people outside the process, for example, if there are safety issues that could cause imminent harm to others.

A court or tribunal may also consider it necessary that a participant testify as a witness or order the production of documents to have information from mediation shared in order to obtain justice in a different proceeding. Participants must understand that there is a difference between an expectation of confidentiality and what the court may consider admissible as evidence in a subsequent proceeding. For example, settlement proposals are generally both confidential and inadmissible in court whereas factual information that forms the basis of the case may remain confidential in mediation but admitted into evidence if the case is heard by a court or tribunal.

Confidentiality agreements also serve other valuable functions such as building in exceptions that permit participants to share information with select people outside the process. This exception is likely to be unique to the circumstances of the case, for example, sharing information with a supervisor who is not a direct participant, but who

will be responsible for altering an employee's workplace to accommodate a disability. Agreements achieved in mediation normally have a high compliance rate because participants are involved in the decision-making process.

Balancing power

Power imbalances can be caused by disparities in:

- access to relevant information or professional advice
- language skills, communication willingness or proficiency, and comprehension levels
- physical, emotional or intellectual capacity
- education
- position or seniority in the workplace or the community
- economic or job security
- past experiences related to physical, sexual or emotional assault
- the ability to influence others at work or in the community
- personal or religious guilt or blame
- social conditioning and past opportunity due to stereotypes related to personal attributes such as gender, race, color, ethnic origin, and age
- the ability to control space and time
- physical presence or gesture

An experienced mediator will address power imbalances by using process management techniques such as:

- monitoring and allocating use of time
- acting as a shuttle diplomat to relay information
- reframing language used by one participant to communicate with another
- physically separating the participants
- acknowledging power and seeking assurances to protect the other participant

- taking time to meet independently with and prepare each participant
- watching body language, other cues, and calling for breaks in the process
- referring participants to professional advisors or support people to provide needed coaching, advice or information either before or during the mediation process
- terminating the mediation process when necessary

8. Mediation case studies

This section of this paper depicts four workplace scenarios and interactions that, if not resolved, might result in the filing of a formal human rights complaint. This section of the paper illustrates how mediation can be used in a workplace to informally resolve concerns about inappropriate, harassing or discriminatory behavior. The cases selected illustrate behaviors related to protected grounds, abuses of power, and performance issues that are commonly associated with workplace complaints:

1. gender (sexual harassment)
2. race, sexual orientation and personal harassment
3. disability
4. religion

In an ideal situation, mediation occurs before a formal complaint is filed. In some cases, mediation may be appropriate after a formal complaint is filed. If that is the case, it is best to contact the Alberta Human Rights and Citizenship Commission and speak with a human rights officer before agreeing to participate in mediation of a formal complaint.

Although the case studies below are hypothetical, they are based on compilations of facts that arose in actual workplaces.16 No case is based solely on events that occurred in a specific workplace. Any resemblance to a past or current workplace dispute or human rights complaint is purely coincidental.

Mediation case study #1: Gender (sexual harassment)

An employee subjects another employee of the opposite gender to unwanted emails and advances of a sexual nature. This case study could just as easily involve people of the same gender.

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16 Based on 200 workplace complaints reported to the author of this paper between 1994 and 2000.

Facts

Two employees work in the same department of a medium-size business. They reside in the same community and attend the same religious and community functions. Their relationship outside work is becoming too friendly for one employee, but not intimate enough for the other employee. The emails, physical contact and sexual innuendos are increasing in frequency at the office, at community functions and at religious services. The unwanted emails contain work-related information plus a hint of sexual content.

The employee who does not welcome the advances attempts to communicate discomfort by stepping away from the other employee when physical contact occurs; turning away when oral communication attempts are made; and deleting email (unopened) received from the other employee. The employee making the advances seems oblivious to these signals of rejection.

Impact on work and personal performance

The employee who does not welcome these advances becomes ill and anxious when it is time to go to work. The employee's absenteeism rate at work, at community functions, and at religious functions is increasing. The employee's productivity is decreasing. The employee is finding it increasingly difficult to concentrate. Prior to this series of events, the employee's supervisor became concerned about the employee's performance. The supervisor now begins to question the employee's commitment to the workplace. The employee is feeling guilty about making errors and missing work, religious and community events. These feelings are having an impact on the employee's personal life. The employee is unable to disclose to the employee's extended family what is occurring at work; doing so would shame the family in the eyes of the community.

The employee whose advances are not being acknowledged begins to develop feelings of anger, rejection and worthlessness. The frustrated employee begins to cause difficulties for the other employee. This disruptive behavior distracts both employees from their regular duties. Productivity issues and errors began to arise for the department.

The supervisor notices that the working relationship of all employees in the department is beginning to suffer. Something needs to be done to resolve the situation. Firing both employees seems to be an obvious solution. But, is there a less disruptive option that would call less attention to the supervisor's unit?

Mediation

The supervisor has a good relationship with each employee. The supervisor offers to explore the mediation process with each employee. The supervisor affirms management's duty and willingness to protect each employee from retaliation and to maintain confidentiality to the greatest extent possible. Each employee trusts the supervisor and everyone agrees to mediation.

During the mediation process, the employees disclose more details. Each employee outlines their needs, the impact of the other person's behaviors, and what is required in order for them to put their relationship back on a more appropriate footing. The employee who engaged in the unwanted behavior discloses that personal issues, involving an intimate friend outside the workplace, are contributing to the employee's need for acknowledgement. The employee begins to realize that the behaviors are disruptive and upsetting. Both employees acknowledge that they feel pressured to interact with one another at religious and community activities. They begin to become more aware of one another's needs and feelings.

Agreements achieved in mediation

The employee who engaged in the inappropriate behaviors agrees to seek counseling. The employee also agrees to cease the behaviors intended to gain attention from the other employee. The employees agree that their emails will be limited to work-related content only. The supervisor explains the employer's policy regarding the appropriate use and handling of email to both employees. It is also agreed that management requires no further action unless the unwanted behaviors resume. The employees agree to remain distant from one another at community and religious functions. The supervisor also discusses and obtains commitments from each employee concerning performance deficiencies.

Outcomes

The office roles and productivity of each employee gradually return to normal as time demonstrates that the other person is sincere and the unwanted behavior stops. Absenteeism stops and involvement in religious and community activities resumes. The employees gradually resume a level of respect and trust for one another. The employer retains two valuable employees rather than losing one or both.

Mediation case study #2: Race, sexual orientation and personal harassment

A business client and employee are subjected to racial insults and personal harassment at a work-related social function.

Facts

A work-related social function is held to celebrate an employee's award for outstanding community service. The award-winning employee is a corporate sales representative for a medium size company. The employee raises funds for a First Nations community program.

Many customers and community leaders, several of whom are aboriginal people, are guests at the company's social function. The business owner is absent. The employee's supervisor makes a short speech to commend the employee and comment on how important it is for the company to support community-based programs. The supervisor

makes statements that are based on stereotypes about aboriginal people. The room of people becomes very quiet when these statements are made. No one knows what to say or how to react to these remarks.

Sensing that something is wrong, the supervisor focuses the group's attention on the award-winning employee. In an attempt to be humorous and to liven up the celebration, the supervisor ridicules the employee in front of the others because the employee is not consuming alcohol to celebrate the award. In doing so, the supervisor uses a derogatory label that stigmatized members of the gay community. The ridiculed employee leaves the social function early, as do several customers and community representatives.

Impact on the business, the community, and the employee

One of the aboriginal community members, who is also a business client, contacts the owner of the business and indicates that the aboriginal community is very upset about the discriminatory remarks, is going to boycott the business, go to the media with their concerns, and make a formal request that the award-granting agency rescind the award. The award-winning employee refuses to work with the supervisor and wants to quit.

Mediation

The company's human resource manager suggests that the company retain an external mediator to resolve this matter. The mediator obtains consensus on the mediation process. It is agreed that, due to the complexity of the case and the number of people involved, several separate mediation meetings are needed. The mediator meets with: 1) the community members to address differences in interest and desired outcome; 2) the award-winning employee; and 3) the human resources manager. After gaining a better sense of their perceptions, needs and desired outcomes, the mediator holds separate meetings between: 1) the supervisor and the human resource manager; 2) the supervisor, the award-winning employee and the human resource manager; 3) the community members and the business owner; and the 4) balance of the employees who were present at the function.

During these numerous meetings, the aboriginal community members and the award-winning employee discuss the impact of the remarks and the needs they are attempting to address by holding the supervisor and the employer accountable. The supervisor acknowledges that the remarks about the aboriginal community were very poorly worded. The human resource manager speaks about the impact of losing a valuable employee.

During these mediated discussions, the business owner expresses concerns about the undermining of extensive efforts to gain the business and trust of the aboriginal community. The business owner acknowledges the inappropriateness of the stereotypes that were directed at both the aboriginal community and the gay community.

During these meetings, the mediator assists the participants to identify their common goals, how they can articulate and work toward their goals, and what is required to make

amends in a meaningful and sincere way. The mediator also obtains feedback to improve relations with the aboriginal community.

Agreements achieved in mediation

When the supervisor hears about the impact of the comments on the aboriginal community, the supervisor agrees to apologize to each elder and also in writing to the entire aboriginal community. The aboriginal community accepts these apologies. They also obtain a sincere commitment from the employer and the supervisor to develop a joint media campaign that will educate others about the negative impact of stereotypes. The aboriginal community acknowledges the effort made by the business owner and the supervisor to address their concerns. They agree to continue to do business with the company. They also agree to use their media contacts to highlight the benefits of working with a mainstream business to support the aboriginal community.

The supervisor acknowledges that there was no justifiable reason for pressuring the award-winning employee to consume alcoholic beverages. The supervisor admits to feeling insecure and jealous toward the award-winning employee because that person is younger and enjoying higher sales than the supervisor. The human resource manager agrees the supervisor's administrative workload should be reduced so that the supervisor can spend more time on sales. The supervisor agrees not to repeat the inappropriate behavior. The supervisor also agrees to participate in counseling. The award-winning employee agrees to share some sales tips to enhance the supervisor's success and reduce feelings of competitiveness.

The business owner accepts a number of the suggestions made by the employee group to build awareness in the workplace and enhance the company's relationship with the aboriginal community. These suggestions are incorporated into some of the solutions proposed to the aboriginal community.

Outcomes

The aboriginal community and the business owner reaffirm their trust and respect for one another, and their values. Goodwill increases. The employee's community service award is not jeopardized. The award-winning employee remains with the company and, in collaboration with the supervisor, builds a more successful sales team. The remainder of the employees perceive that they made a valuable contribution because a number of their suggestions to build a better relationship are adopted by the business owner and the aboriginal community.

Mediation case study #3: Disability

An employer accommodates an employee's invisible disability.

Facts

An employee of a manufacturing plant is diagnosed as suffering from depression. The employee's physician prescribes anti-depressant medication. The medication makes the employee drowsy during the most demanding production activities. As a result of the medication, the employee's productivity decreases and errors increase. The employee operates machinery that could put the employee and others at risk. Due to the social and cultural stigma of being diagnosed with depression, the employee is too embarrassed to tell the supervisor about the diagnosis.

The employee's supervisor becomes annoyed with the employee and begins to write reports that are critical of the employee's performance. The employee becomes more depressed. The employee's relationship with the supervisor was already tense due to a lack of mutual cultural respect.

The ill employee drops a bottle of anti-depressant medication in the lunchroom. Another employee notices the medication and inquires about the state of the ill employee's health. The ill employee becomes very emotional and attempts to convince the observer that the pills are vitamins.

The other employee is concerned about the effect of the medication and the safety of co-workers. The other employee informs the supervisor about the medication. The supervisor becomes very upset with both employees and threatens that if they do not "shape up and mind their own business," they will both be out of a job. The employee who approached the supervisor goes to a senior manager and requests that someone intervene before both employees lose their jobs or someone is hurt.

Mediation

The senior manager asks an internal and respected supervisor to serve as an internal mediator. The mediator meets with the employee and supervisor, and explains that mediation is quite confidential. With this assurance, the employee and supervisor agree to participate in mediation. They also agree that the company's human resource officer will be included in order to address the supervisor's concerns about performance.

Upon learning about the employee's medical condition, the human resource officer explains the company's legal duty to accommodate employees who have a medical disability. The human resource officer explains to the employee and the supervisor that, with appropriate medical input, accommodation of the employee's medical needs can be considered, and a restructuring of work duties may be arranged.

The mediator explores with the supervisor the impact of an employee not requesting accommodation (job loss due to poor performance allegations or injury to the employee or a co-worker). The mediator also obtains from the supervisor additional information about cultural differences, and how those differences are allegedly affecting workplace performance.

Agreements achieved in mediation

During the mediation process, everyone agrees that worker safety and building a better relationship between the supervisor and employee are important goals. The employee agrees to ask the doctor to communicate with the human resource officer about the type of accommodation needed so that the employee can continue to work in a safe manner. The mediator and the human resource officer agree to meet again after the medical report is received.

In the interim, the employee and supervisor agree that the employee will not operate any dangerous equipment. The human resource officer supports the supervisor's decision to refrain from documenting performance concerns until accommodation of the employee's medical needs can be considered.

The employee and supervisor also agree to continue with mediation, but apart from the human resource officer, to address their concerns about cultural differences. During these discussions, the employee and supervisor learn from one another that their differences were not based as much on cultural values, as on political differences that existed between their respective countries of origin.

Outcomes

The employee's needs are accommodated. The employee's performance is no longer an issue. The employee remains with the company rather than leaving and incurring the risk of being unemployed.

The supervisor no longer feels pressured to document poor performance. The supervisor and employee agree that each could remain loyal to their country of origin while at the same time working toward building a co-operative relationship in a Canadian workplace. They agree to refrain from making slurs about the other person's place of origin and to focus on the positive work experience that each had gained from their country of origin. The relationship improves between the employee and the supervisor. The employee's feelings of shame and anger are replaced with feelings of a more positive nature.

The employer retains a valued employee and meets its legal duty to accommodate an invisible disability.

Mediation case study #4: Religion

A workplace policy accommodates an employee's religious needs and eliminates a systemic barrier.

Facts

Several years ago, a medium-size business adopted a policy that allowed all employees to take a specified number of days off, with pay, to celebrate Christmas and Easter. In the interest of fairness, the business's policy provided that all employees receive the same days off. The business was closed at Christmas and Easter.

Recently, three non-Christian employees join the business. They held professional positions in their country of origin. Their professional credentials and formal training were not recognized in Alberta; therefore they assumed technical jobs in different operational areas. Two of the three non-Christian employees are also the only visible minority employees in the business. They perceive that because of their color, they are observed more closely by management than their Caucasian peers. It is clear that they have much more knowledge and technical experience than most of the other employees. The non-Christian employees make a number of suggestions that are adopted by management. These suggestions provided immediate economic benefit to the business.

The religious practices of these three employees requires them to recognize holy days that do not coincide with Christmas or Easter. These non-Christian holy days are regarded as regular business days by the business and the remainder of the employees.

The employer expects the non-Christian employees to be at work on their holy days. The religious community expects the non-Christian employees to be at their place of worship on their holy days. These conflicting expectations create a dilemma for the employees. The employees perceive that their only option is to claim sickness in order to have their holy days off without losing their pay or their jobs.

Other employees are suspicious that the non-Christian employees are taking advantage of the business's sick benefits policy to cover their absences. They resent the non-Christian employees for taking advantage of the system to unfairly gain an extra day off with pay.

A Christian employee complains to management about abuse of the sick benefits policy. The Christian employee makes it clear that the other Christian employees are very angry and upset with this situation. They want the visible minority non-Christian employees fired. They want the Caucasian non-Christian employee to stay if the sick benefits policy is no longer abused.

The business manager calls for a meeting with the non-Christian employees to discuss the alleged abuse of the sick benefits policy. The employees request that a mediator be present. In view of the potential for hostility between the two groups of employees, the business manager agrees to the request for mediation.

Mediation

The non-Christian employees meet with the mediator. They are reluctant to share their reasons for their absence because they are afraid of losing their jobs. The mediator is able to draw from the employees the real reason for their absence. The mediator seeks and receives permission from the employees to share the reason for their absence with the employer. The mediator does so and then urges the business manager to prepare for the next meeting by seeking appropriate professional advice about the employer's duty to accommodate employee religious needs.

The mediator also meets with the Christian employees. The mediator urges this group to identify their needs. It becomes clear that their resentment is motivated in part by feelings of anxiety. They are worried that they will lose their jobs to more people "like them." This group of employees is keenly aware of the expertise that the three non-Christian employees bring to the workplace.

The three non-Christian employees and the mediator meet with management. The employees explain their need for religious accommodation. The business manager points out to the employees that other employees and management are aware of the coincidental timing of the sick days. The business manager outlines the consequences of employees feigning sickness.

Based on the advice of a professional advisor, the business manager acknowledges that the business has a legal duty to accommodate religious needs and that the company policy, as currently written, could be more inclusive. The mediator facilitates a brainstorming session between the non-Christian employees and the business manager to identify policy solutions that will accommodate religious needs. The business manager agrees to allow Christian and non-Christian employees time off and with pay for religious observance.

The mediator then focuses the business manager's attention on the needs of the Christian employees. The Christian employees want to feel valued and secure in their jobs. A meeting is arranged with some of the more senior Christian employees. They speak about their worries concerning job security. The business manager is surprised to hear these views. The business manager planned on employing this group until their retirement. The business manager and the employees discuss different ways that they can communicate assurances to the Christian employees.

Agreements achieved in mediation

The business manager agrees to amend the company's policy to allow employees of different faiths a specified number of days off as pre-determined and identified by recognized religious leaders in the community. This approach allowed the business manager to remain confident that the days off were legitimately required for religious reasons. The employer agrees to keep the business open, and to use a skeleton staff on

traditional Christian holidays. The non-Christian employees agree to work on the Christian holidays.

The business manager agrees to implement a "valued employee" reward system. This system motivates people to work and, at the same time, acknowledges good effort. The business owner also implements other strategies so that the most senior employees can see how they will continue to fit into the business. The business manager also provides the employees with educational information and support so that they can update their technical knowledge. Cross-cultural awareness building activities are also implemented in the workplace.

Outcomes

The religious needs of the non-Christian employees are accommodated. The non-Christian employees no longer feel pressured to claim sickness once their accommodation needs are met.

The Christian employees no longer resent their co-workers. Instead, thanks to the change in business communication style, they are more secure in their jobs. They also become more aware that their co-workers have different religious beliefs and cultural backgrounds. Relationships between the Christian and non-Christian employees gradually improve; people become curious about one another's religious views. Additional new employees, who have different religious beliefs or cultural backgrounds, are accepted more readily.

The business increases its market share by remaining open for business during Christian holidays. The business meets its legal duty to accommodate religious needs.

9. Finding and hiring a mediator

Employers may select or appoint a mediator who is external to the organization, or a mediator who is internal to the organization, to resolve a workplace dispute. If an internal employee is selected to serve as a mediator of a workplace dispute, that person should possess the necessary skills, mediation training and expertise to effectively assist the participants. As in the case of an external mediator, an internal mediator must not only be neutral, but also be perceived as neutral by the participants and other stakeholders.

Failure to appoint a neutral mediator can be a serious obstacle to success and put the credibility of the mediation process in question. It is therefore important to identify and, if selecting internally, properly train appropriate resource people to serve as mediators. This step should occur as soon as the policy decision to incorporate mediation into the organization's dispute resolution system occurs. The selection of a mediator should be carefully thought out in advance of a dispute arising. Ideally, mediator selection should occur as part of the employer's preventative planning process. Mediator selection should

not be based on a knee-jerk reaction to a sensitive, and possibly highly emotional, work-related complaint.

Regardless whether the mediator is internally or externally appointed, factors to consider include:

- prior experience with human rights cases, employee relations, and diversity issues and knowledge of the subject matter
- references and their relevance to the nature of the concerns and your business
- case resolution rate
- familiarity with the need to protect participant confidentiality to the extent permitted by law
- whether the mediator provides the participants with a "protocol" or typical mediation plan so that they have an understanding of the process
- formal post-secondary education
- mediation training and the reputation of the organization that provided the training
- professional status, if any, and whether the person is in good standing with the appropriate regulatory body
- co-mediation experience, if any. It is impossible for a mediator to be familiar with the needs, customs and values of every cultural or societal group. A mediator with excellent process management experience may partner with a mediator of the opposite gender or sexual orientation, or cultural or racial group, to enhance the ability of the process to respond to the diverse needs of the participants. This type of co-mediation may be especially helpful in workplace cases related to harassment and discrimination.
- an understanding of your organization and its culture
- whether the mediator is a member in good standing with conflict resolution or mediation associations, such as the Alberta Arbitration and Mediation Society
- personal and professional attributes such as: ability to communicate across cultures in a straightforward and simple manner, to demonstrate cultural and gender sensitivity, to demonstrate empathy without compromising neutrality, and to be organized, thorough and timely in terms of case management

Internal mediators

Advantages of internal mediators include:

- high level of familiarity with the business and the people
- minimal time required to learn about the needs of the business
- understands operational issues
- salary is paid by the company therefore no additional expense is incurred
- may be trusted by employees and have a reputation for integrity
- may be readily available

Disadvantages of internal mediators include:

- may be perceived as biased or loyal to certain groups of employees or management
- may not have the time or skills required to effectively mediate
- may not be objective or perceived as trusted due to familiarity with the business or its people
- may be perceived as having a "stake" in the outcome and how it affects the organization
- may be perceived as lacking value because the role is an "add on" to the person's other work-related duties

External mediators

External mediators can be retained through referrals, private retainer and referral organizations or agencies that make rosters of mediators available to the public. The following sources of information may prove useful when seeking a mediator with expertise resolving workplace harassment concerns:

- The Alberta Arbitration and Mediation Society, Phone: 1-800-232-7214
- The Mediation and Restorative Justice Centre, Phone: (780) 423-0896
- Better Business Bureau of Southern Alberta, Dispute Settlement Centre
  Phone: (403) 531-8788, Web site: www.betterbusiness.ca/dispute_settlement/index.asp

- Your company's legal counsel
- The Internet or the Yellow Pages of the telephone directory

Advantages of external mediators include:

- More likely to be perceived as having no loyalties to anyone in the business
- Bring a fresh perspective to the problem
- May offer a high degree of conflict resolution and mediation experience, skills and knowledge that help to facilitate creative problem solving
- Generally, no ongoing relationship with anyone in the business, therefore employees are not continually reminded of the "problem" by virtue of the mediator's ongoing presence in the workplace
- Free up existing staff to focus on their roles within the company rather than take on the additional role of mediator

Disadvantages of external mediators:

- More costly than an internal employee
- May require advance notice
- Will require preparation time to familiarize themselves with the problem, the people, and, to some degree, the business
- No regulated credentialing and qualifications standard. The *caveat emptor* (let the buyer beware) principle applies when assessing mediator credentials.

Mediator fees vary considerably. Most mediators charge each party either by the hour or by the half-day or full day. An administrative fee and preparation fee may also apply. Mediators usually request that clients pay the expenses associated with the mediation process. Expenses include items such as: room space rental, refreshments for the participants, delivery and photocopying costs.

When retaining an external mediator, a written contract should be agreed upon in advance so that both the employer and the mediator have a clear understanding about the services to be provided.

If using a mediator appointed by an agency, it is important to specify that the concern relates to human rights in the workplace; otherwise, the mediator's expertise may relate more to other types of business or employment matters.

10. Concluding comments

Mediation is one dispute resolution process option that can work very effectively to address management and employee concerns about inappropriate behavior in the workplace. However, the process is not the answer in all cases. Mediation is only as effective as the neutral's expertise and the organization's willingness to support the process and the participants in the process.

An organization's policy is invaluable to support the use of mediation in the workplace. A policy can also be one component of a conflict prevention program that includes investing in education. It is important for organization leaders, union representatives and employees to recognize that conflict is part of human interaction. Providing education and opportunities for mediation are effective ways to address conflict and invest in the people that are a business's greatest asset.

Recommended Reading List[17]

The Dynamics of Conflict Resolution: A Practitioner's Guide, Bernard Meyer (2000), San Francisco, Jossey-Bass

Bridging Troubled Waters: Conflict Resolution from the Heart, Michelle LeBaron (2002), San Francisco, Jossey-Bass

Mediating Dangerously: The Frontiers of Conflict Resolution, Kenneth Cloke (2001), San Francisco, Jossey-Bass

Getting to Peace, William Ury (1999), New York, Viking Press

Emotional Intelligence, Daniel Goldman (1995), New York, Bantam

Negotiating at an Uneven Table: Developing Moral Courage in Resolving our Conflicts, 2nd Ed. Phyllis Beck Kritek (2002), San Francisco, Jossey-Bass

Talking From Nine to Five: Women's and Men's Conversational Styles, Deborah Tannen (1994), New York, William Morrow Co.

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Forsythe, G. H., "A Comparative Analysis of Canadian and American Law Relating to the Preservation of the Confidentiality of Settlement and Mediation Discussions," 2001, ProQuest Company

GSA Office of Equal Opportunity, "The Cost Savings Associated with the Air Force Alternative Dispute Resolution Program," 2002

Law Society of Upper Canada Research and Planning Committee, "Short Glossary of Dispute Resolution Terms," July 1992

State Bar of Texas Standing Committee on Dispute Resolution "Handbook of Alternative Dispute Resolution," (2d) Editor: Amy L. Greenspan, 1990

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17 Excerpt from Sally & Terry's "Top Ten" A Recommended Reading List, BC Mediator Roster Society Newsletter, "The Roster Report" Issue VII, March 2003 at 3

Contact the Alberta Human Rights and Citizenship Commission

The Alberta Human Rights and Citizenship Commission is an independent commission of the Government of Alberta reporting through the Ministry of Community Development. Our mandate is to foster equality and reduce discrimination. We provide public information and education programs, and help Albertans resolve human rights complaints.

Please note: A complaint must be made to the Alberta Human Rights and Citizenship Commission within one year after the alleged incident.

Northern Regional Office
800 Standard Life Centre
10405 Jasper Avenue
Edmonton, Alberta T5J 4R7
Confidential Inquiry Line (780) 427-7661
Fax (780) 427-6013

Southern Regional Office
Suite 310, 525 – 11 Avenue SW
Calgary, Alberta T2R 0C9
Confidential Inquiry Line (403) 297-6571
Fax (403) 297-6567

To call **toll-free** within Alberta, dial 310-0000 and then enter the area code and phone number.

For province-wide free access from a **cellular phone**, enter *310 (for Rogers-AT&T) or #310 (for Telus).

TTY service for persons who are deaf or hard of hearing
Edmonton (780) 427-1597
Calgary (403) 297-5639
Toll-free within Alberta 1-800-232-7215

E-mail humanrights@gov.ab.ca
Web site www.albertahumanrights.ab.ca